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Brooke Hardin

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# ***Fernandez-Vargas v. Gonzales: An Examination Of Retroactivity And The Effect Of The Illegal Immigration Reform And Immigrant Responsibility Act***

**By Brooke Hardin\***

## **I. INTRODUCTION**

Imagine you are of Hispanic descent, but have been living in the United States for the better part of 40 years. Your home is in the heartland of America, where you have a wife and a child. You also own a successful trucking business, which you consider to be a tremendous accomplishment due to your humble beginnings in Mexico. You are the embodiment of the American dream.

Now imagine being pulled away from your home, family and business and being shipped back to Mexico, notwithstanding the fact that you have lived as a model citizen for many decades. Also, due to the application of a new immigration law, you are unable to request judicial review of the deportation, even though you have cultivated such intimate ties to the nation.

This is the unfortunate story of Humberto Fernandez-Vargas.<sup>1</sup> In the country illegally, he was deported in the 1970's, and re-entered the country covertly where he remained undetected until 2001.<sup>2</sup> Once discovered by immigration authorities, the original 30-year-old deportation order was reinstated pursuant to new immigration reform, the Illegal Immigration Reform and Immigrant Responsibility Act of

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\* J.D. Candidate, 2007, Pepperdine University School of Law. Ms. Hardin would like to thank her parents, Dennis and Mary-Ellen Hardin, and her fiancé, Brian Jarvis, for their years of support and encouragement.

1. See *Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422, 2427 (2006).

2. *Id.*

1996 (“IIRIRA”).<sup>3</sup> Part of the new act is a provision that eliminates a re-entrants ability to challenge the original order – something our history of immigration law has never seen – regardless of the immigrant’s changed circumstances or other possible avenue for discretionary relief.<sup>4</sup>

However, due to the fact that Fernandez-Vargas re-entered in the early 1980’s, he argued that application of the new immigration act would be impermissibly retroactive; instead, he argued that the Supreme Court should apply the more immigrant-friendly Immigration and Nationality Act which allowed for discretionary review of previously executed deportation orders.<sup>5</sup> The Supreme Court, however, found no impermissive retroactive application to Fernandez-Vargas, and the previous deportation order was reinstated without the opportunity for further procedural relief.<sup>6</sup>

Therefore, due to the precedent set in *Fernandez-Vargas v. Gonzales*, all aliens who re-enter the country after being deported – no matter the date of re-entry – are automatically and irrefutably subject to the prior deportation order, with no possibility of appeal or judicial review of the order.<sup>7</sup>

In this note I will discuss a general background of the various laws that led up to the creation of IIRIRA, as well as the impact this legislation had on deportation proceedings in the United States. I will also discuss the Supreme Court’s analysis of this law and its application to immigrants who have illegally re-entered the country before the effective date of the Act. I will conclude with a critique of the Court’s reasoning and the effect this decision will have on the future of deportation proceedings in the United States.

## II. BACKGROUND

In the earliest stages of our country’s history, few restrictions were placed on immigration.<sup>8</sup> However, around the turn of the 19<sup>th</sup>

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3. *Id.*

4. See 8 U. S. C. § 1231(a)(5) (2005).

5. *Fernandez-Vargas*, 126 S. Ct. at 2427.

6. *Id.* at 2434.

7. See § 1231(a)(5); see also *Fernandez-Vargas*, 126 S. Ct. at 2434.

8 Elwin Griffith, *The Transition Between Suspension of Deportation and Cancellation of Removal for Nonpermanent Residents Under the Immigration and*

century, the President was given the power to deport any alien who posed a threat to the welfare of American citizens.<sup>9</sup> Yet even with this power, a deportation candidate still had the ability to convince the President that he posed no such danger; if he succeeded, the alien would be allowed to remain in the country if his behavior conformed to accepted social norms.<sup>10</sup> Since that early time, aliens have been limited in their ability to convince American officials that their tenure in this country should not be cut short, as immigration/deportation law has been made stricter.

The issue here, however, does not concern the nation's power to or reasons for deporting aliens – instead, the issue concerns which law to apply to an alien who illegally *re-enters* the country after being subject to a deportation order.<sup>11</sup> The statute that determined Petitioner's fate was actually the culmination and reformation of three laws with deportation re-entry provisions: the Internal Security Act of 1950, which immigration provisions were reformed by the Immigration and Nationality Act two years later, and again reformed in 1996 by the Illegal Immigration Reform and Immigrant Responsibility Act.<sup>12</sup> With each new law, the scope of deportation was broadened and the procedures for discretionary judicial view were tightened.<sup>13</sup> Below is a general synopsis of each statute.

#### *A. The Internal Security Act of 1950*

Congress enacted the Internal Security Act in 1950 in an attempt to control what the nation perceived as a growing Communist threat

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*Nationality Act: The Impact of the 1996 Reform Legislation*, 48 DRAKE L. REV. 79, 79 (1999).

9. *Id.*

10. *Id.* at 80.

11. See *Fernandez-Vargas*, 126 S. Ct. at 2425. As will be discussed in some detail, petitioner Fernandez-Vargas disputed the potential retroactive effect in applying the current statute, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. *Id.* at 2427. He argued that because he re-entered the country before the implementation of this statute, the more lenient prior statute should be applied. *Id.* As will be discussed, the Supreme Court did not agree. *Id.* at 2430.

12. See *Fernandez-Vargas*, 126 S. Ct. at 2426-27 (2006).

13. *Id.*

within its borders.<sup>14</sup> The Act grew out of specific findings regarding the supposed nature of the Communist party, and the effect of Communist immigration to the United States.<sup>15</sup>

The Internal Security Act also amended previous rules regarding deportation.<sup>16</sup> Under the Act, the Attorney General had the authority to detain and deport certain undesirable aliens, focusing primarily on those aliens who were also members of the Communist party.<sup>17</sup> In fact, numerous Supreme Court cases upheld the Attorney General's

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14. *Reno v. Flores*, 507 U.S. 292, 335 (1993). The text of the Act clearly depicts what degree of threat Congress considered Communists to be. Section 2 of the Act states:

There exists a world Communist Movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental or otherwise), espionage, sabotage, terrorism, and any other means deemed necessary to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization. The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality.

Internal Security Act of 1950, § 2(1),(2) (1946).

15. *Id.* at n. 25. Congress determined the Communist party to be, [a]n organization numbering thousands of adherents, rigidly and ruthlessly disciplined...awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement.

*Carlson v. Landon*, 342 U.S. 535, n.21 (1952) (quoting § 2(15) of the Internal Security Act of 1950)).

16. *Fernandez-Vargas*, 126 S. Ct. at 2426.

17. *Id.* at 335.

power to deport an alien solely based upon his status as a Communist, on the grounds of preserving national security.<sup>18</sup>

The Act also allowed for immediate reinstatement of previously executed deportation orders.<sup>19</sup> However, these provisions only applied to certain types of aliens: namely, those labeled as “anarchists” or “subversives.”<sup>20</sup> Therefore, all other aliens that were not directly considered a threat to national security were processed under normal deportation rules.<sup>21</sup> It was not until the Immigration and Nationality Act of 1965 that the class of citizens subject to reinstatement of deportation orders was broadened.<sup>22</sup>

### *B. The Immigration and Nationality Act of 1965*

The laws of deportation were once again reformed in 1965 with the emergence of the Immigration and Nationality Act (“INA”).<sup>23</sup> However, compared with the current state of deportation laws, the INA was still relatively tame. The decision to deport an alien must have been made while mindful of an alien’s inherent due process rights, and must have been based upon “reasonable, substantial, and probative evidence.”<sup>24</sup> Additionally, the standard of review was set above the civil “preponderance of the evidence standard” and was anchored by the Supreme Court at “clear and convincing.”<sup>25</sup> Furthermore, each alien had the ability to appeal a deportation order

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18. See generally *Carlson*, 342 U.S. at 524. Courts have interpreted that the Attorney General may use his discretion in deportation cases in order to protect the nation from “active subversion.” *INS v. National Center for Immigrants’ Rights*, 502 U.S. 183, 194 (1991).

19. *Fernandez-Vargas*, 126 S. Ct. at 2426.

20. *Id.* The act also applied to criminals, prostitutes, and procurers or other immoral persons. 8 U. S. C. § 156(c) (1946).

21. *Id.* Therefore, aliens not considered anarchists or subversives who re-entered the country were not subject to the previously issued deportation order. *Id.*

22. *Fernandez-Vargas*, 126 S. Ct. at 2426.

23. See 8 U. S. C. § 1252(f) (1994) (also known as INA § 242(f)).

24. Kirk L. Peterson, “*Final*” *Orders of Deportation, Motions to Reopen and Reconsider, and Tolling Under the Judicial Review Provisions of the Immigration and Nationality Act*, 79 IOWA L. REV. 439, 446 (citing STEVEN C. BELL, PLI LITIG. & ADMIN. PRAC. COURSE HANDBOOK, BASIC IMMIGRATION LAW 13 (No. 373 1989)).

25. Peterson, *supra* note 24 at 446.

to Board of Immigration Appeals, and could even petition to have the order reviewed in a federal appellate court.<sup>26</sup>

As mentioned previously, the INA of 1965 expanded the rules regarding the reinstatement of deportation orders against aliens who re-entered the country illegally.<sup>27</sup> The new text of the rule stated that “any alien” who re-enters after being deported – before or after 1952 – shall be issued the same deportation order as the one previously executed.<sup>28</sup> But once again, this law only applied to *certain* aliens, despite the use of the term “all.”<sup>29</sup> Furthermore, if an alien was subject to the renewal of a previous deportation order, he could petition for some discretionary relief from the order.<sup>30</sup> The order was by no means applicable to all illegal re-entrants, and was by no means a procedural dead end.<sup>31</sup> Not until the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 were an illegal re-entrant’s procedural due process rights brought to a halt.<sup>32</sup>

### *C. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996*

IIRIRA was signed into law by President Clinton on September 30, 1996.<sup>33</sup> Labeled by some observers as “draconian,” IIRIRA sought to reduce the swell of illegal immigration into the United States.<sup>34</sup> The two most notable provisions of the act are the provisions for expedited removal as well as the criminal prosecution

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26. *Id.*

27. *See* § 1252(f) (also known as INA § 242(f)).

28. *Fernandez-Vargas*, 126 S. Ct. at 2426.

29. *Id.*

30. *Id.*

31. *Id.*

32. *See* § 1231(a)(5). As will be discussed, under the new law, once an alien has been afforded the due process of an original deportation hearing, no additional hearing, nor the opportunity for discretionary review of the prior order, is given. *Id.*

33. David M. Grable, *Personhood Under the Due Process Clause: A Constitutional Analysis of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 83 CORNELL L. REV. 820, 821 (1998).

34. Grable, *supra* note 33 at 821.

for aliens who re-enter, or attempt to re-enter, the United States after having been previously deported.<sup>35</sup>

The constitutional questions surrounding the new law are substantial: are the alien's due process rights violated by his inability to appeal a determination of admissibility?<sup>36</sup> Furthermore, can this unappealable determination be used as the basis for subsequent criminal prosecution?<sup>37</sup>

IIRIRA rests the power of an alien's continued tenure in the United States in the hand of just one immigration official.<sup>38</sup> This lone official may and "shall order the alien removed from the United States without further hearing or review."<sup>39</sup> Not only is the decision given to only one immigration official, these expedited deportation orders are neither administratively nor judicially reviewable.<sup>40</sup> Thus, an alien facing deportation has no recourse, no matter how grave the consequences may be.<sup>41</sup>

Although many people may be unaware of this fact, *all* persons, from all nations across the globe, are afforded protection under our Constitution the minute they step foot on American soil.<sup>42</sup> Aliens cannot be deprived of procedural due process solely due to their status as legal or illegal.<sup>43</sup> Obviously, though, under IIRIRA,

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35. *Id.*

36. *Id.* at 822.

37. *Id.* Some argue that these provisions are diametrically opposed to Supreme Court precedent establishing aliens' constitutional rights in criminal trials. *Id.* The main concern stems from the fact that the deportation order is made by a single immigration inspector – and yet this one inspector's opinion is subject to no judicial review. When one contemplates the grave issues at stake (such as the presence of dependent family members within the United States), it is relatively easy to understand why such an individualized determination makes many observers and critics uneasy about the new law.

38. See INA § 241(a)(5), 8 U. S. C. § 1231(a)(5).

39. See *id.*

40. Grable, *supra* note 33 at 826.

41. *Id.*

42. Peterson, *supra* note 24 at 445. This immigration scholar asserts that that all persons, whether they entered the United States legally or illegally, are to be afforded the protections under the due process clause of the Constitution. *Id.*

43. *Id.*



Congress decided that only *very limited* due process is required to fulfill this Constitutional requirement for deportable aliens.<sup>44</sup>

An alien subjected to expedited deportation may find that his only option is to covertly re-enter the country. However, the alien now does so at his own peril, as IIRIRA attaches the power of criminal prosecution to aliens who have been subject to previous deportation orders.<sup>45</sup> Of course, in the past, aliens who violate deportation orders have been subjected to criminal prosecution; however, only with IIRIRA is an attack on the validity of that prior deportation order prohibited.<sup>46</sup> Therefore, this lone immigration official's determination is subject to no review, *and can also* subject the alien to harsh criminal consequences.<sup>47</sup>

As seen in the Internal Security Act of 1950 and the Immigration and Nationality Act as promulgated in 1965, aliens who re-entered after the issuance of a valid deportation order may have been deported pursuant to the same deportation order; however, this only applied to certain aliens, and some discretionary review was still available.<sup>48</sup> However, with IIRIRA, *all* aliens who illegally re-

44. *See generally* § 1231(a)(5).

45. 8 U. S. C. 1326(a). This section states that violators may be fined under Title 18, and/or imprisoned for up to two years. *Id.* Therefore, violation of a deportation order is punishable as a felony. *Id.*

46. Grable, *supra* note 33 at 827. Therefore, in the past, during a criminal prosecution, the alien was allowed to argue that the prior deportation order was invalid. However, IIRIRA prohibits collateral attacks on deportation orders, even though the deportation order was never reviewable. Thought of another way, the individual immigration officer's determination of the alien's deportation *conclusively and irrefutably* establishes a critical element of a subsequent criminal offense. *Id.* Hence, the constitutional concerns arise.

47. *Id.* The text of the rule is as follows:

(5) Reinstatement of removal orders against aliens illegally reentering. If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

§ 1231(a)(5).

48. *See supra* note 29.

entered after being deported were immediately re-deported with absolutely no opportunity for discretionary relief.<sup>49</sup> Basically, once an alien is deported, that is the end – he cannot re-enter and seek discretionary relief, no matter the degree of hardship, and may in fact face stiff criminal penalties.<sup>50</sup> However, which law is to be applied when the alien illegally re-enters prior to the enactment of IIRIRA? Are they subjected to IIRIRA's strict provisions, or the only appropriate law to apply the more lenient Immigration and Nationality Act of 1965? Enter, *Fernandez-Vargas*...

### III. FACTS

Humberto Fernandez-Vargas, a Mexican citizen, first immigrated to the United States in the 1970's.<sup>51</sup> Based upon various immigration violations, he was deported in 1981.<sup>52</sup> He attempted, several times, to re-enter the country, but was once again deported on each of those unsuccessful attempts.<sup>53</sup> However, in 1982, Fernandez-Vargas again re-entered the country and remained undetected in Utah for almost 30 years.<sup>54</sup> While in Utah, he founded and operated a trucking business.<sup>55</sup>

In 1989, he fathered a son, who by law is a United States citizen.<sup>56</sup> In 2001, Fernandez-Vargas married the mother of his son,

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49. *See supra* note 47.

50. § 1231(a)(5).

51. *Fernandez-Vargas*, 126 S. Ct. at 2427.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* The United States Constitution provides that all people born within any American state or territory are legal citizens:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. CONST. amend. XIV.

who is also a legal United States citizen.<sup>57</sup> Soon thereafter, his wife filed a relative-visa petition on her husband's behalf.<sup>58</sup> Based upon this petition, Fernandez-Vargas petitioned to adjust his immigration status to that of legal permanent resident.<sup>59</sup>

Unfortunately for Fernandez-Vargas, the filing of these petitions alerted immigration authorities that he was illegally in the country subsequent to the execution of a previous deportation order.<sup>60</sup> In November of 2003, the Government began proceedings to reinstate the 1981 deportation order, and denied him the possibility of discretionary review to adjust his status to lawful permanent resident.<sup>61</sup> He remained in custody for 10 months, and then was removed to Juarez, Mexico in the fall of 2004.<sup>62</sup>

Prior to being removed, Fernandez-Vargas petitioned the United States Court of Appeals for the Tenth District to review the reinstated deportation order.<sup>63</sup> He argued that because he re-entered the country before IIRIRA came into effect, his deportation proceeding should be governed by the prior, more immigrant-friendly INA.<sup>64</sup> If the INA were the governing statute, then Fernandez-Vargas would be able to apply for review of his status, which potentially could be changed to that of lawful permanent resident.<sup>65</sup> In sum, Petitioner argued that application of IIRIRA is impermissibly retroactive.<sup>66</sup>

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57. *Id.*

58. *Id.* See also 8 U. S. C. §§ 1154(a), 1151(b) (2000 ed.); see also *Fernandez-Vargas v. Ashcroft*, 394 F.3d 881, 883.

59. *Fernandez-Vargas*, 126 S. Ct. at 2427; see also 8 U. S. C. § 241(a)(5).

60. *Fernandez-Vargas*, 126 S. Ct. at 2427.

61. *Id.* The statute under which the Government was operating was the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), 8 U. S. C. § 241(a) (1994 ed.).

62. *Fernandez-Vargas*, 126 S. Ct. at 2427..

63. *Id.*

64. *Id.* For a discussion of the INA, see *supra* notes 23-32 and accompanying text.

65. See *supra* notes 23-32 and accompanying text. In fact, if the INA were the controlling statute, Fernandez-Vargas' petition would likely have been successful due to his marriage to a United States citizen. *Id.*

66. *Fernandez-Vargas*, 126 S. Ct. at 2427-28. Statutes are regarded as impermissibly retroactive when their application would "impair the rights a party possessed when he acted, increase a party's liability for past conduct, of impose new duties with respect to transactions already completed." *Landgraf v. USI Film*

Fernandez-Vargas also relied heavily upon *Prado Hernandez v. Reno* from the Ninth Circuit to support his argument that he should be allowed to change his residential status.<sup>67</sup> There, the district court held that an application for adjustment of status, if submitted prior to the reinstatement of the prior deportation order, was not a “request for relief” under the language of IIRIRA.<sup>68</sup> The application for adjustment cannot be considered a request for relief because there was not yet an action to seek relief from.<sup>69</sup> Therefore, although the alien may be deportable under IIRIRA, that does not make him ineligible for adjustment of status if the alien’s petition was submitted *prior to* the deportation order reinstatement.<sup>70</sup>

The Court of Appeals rejected Petitioner’s reliance upon *Prado*, on the grounds that “the district court apparently ignored the fact that

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Products, 511 U.S. 244, 280 (1994). As a general rule, “a statute shall not be given retroactive effect unless such construction is required by specific language or by necessary implication.” *Id.* at 2428, *citing* United States v. St. Louis, S.F. & T.R. Co., 270 U.S. 1, 3 (1926).

67. *Fernandez-Vargas v. Ashcroft*, 394 F.3d 881, 885 (2005) (discussing *Prado Hernandez v. Reno*, 86 F. Supp. 2d 1037(W.D. Washington 1999)).

68. *Prado Hernandez*, 86 F. Supp. 2d at 1041-42.

69. *Id.* at 1041.

70. *Id.* at 1041-42. The Ninth Circuit has ruled similarly in other cases, yet based upon different principles. For example, in *Castro-Cortez v. INS*, the court relied on three main arguments in deciding that IIRIRA was not to be applied to pre-enactment reentries:

First, the court noted that Congress eliminated the retroactivity language from the statute and stated that “Congress’s decision to remove the retroactivity language from this part of the statute provides strong support for the conclusion that it did not intend that the revised provision be applied to reentries occurring before the date of the statute’s enactment.” Second, the court concluded, by negative implication, that, because Congress had specified in several other sections of the IIRIRA whether the sections would apply retroactively, the failure to provide for retroactive application...indicated that Congress did not intend for that section to apply retroactively. Third, the court stated that “Congress is deemed to enact legislation with *Landgraf*’s ‘default rule’ [against retroactivity] in mind...Accordingly, silence provides useful evidence as to intent for the first step of *Landgraf*’s two-part inquiry.

*Fernandez-Vargas*, 394 F.3d at 887 (quoting *Sarmiento Cisneros v. U. S. Att’y Gen.*, 381 F.3d 1277, 1282 (11th Cir. 2004) (quoting *Castro-Cortez v. INS*, 239 F.3d 1037, 1051 (9th Cir. 2001)).

the alien was not deportable but *deported* and was ineligible for relief from that prior deportation under the reinstatement statute.”<sup>71</sup> Thus, the alien’s application for adjustment in status necessarily occurred after the original deportation order was executed.<sup>72</sup>

Furthermore, the appellate court reasoned that simply because IIRIRA does not expressly say whether the reinstatement provision applies to all aliens does not mean that Congress unambiguously intended that the statute *not* apply to pre-enactment reentries.<sup>73</sup> In the absence of clear congressional intent, the court must look at whether the statute has retroactive effect.<sup>74</sup> Here, Petitioner did not petition for change in status until 2001.<sup>75</sup> IIRIRA became effective in 1997; hence, Fernandez-Vargas had no “protectable expectation” of being able to adjust his status.<sup>76</sup> Therefore, the Court of Appeals held that application of IIRIRA had no impermissibly retroactive effect against Fernandez-Vargas, and upheld the reinstated deportation order.<sup>77</sup>

71. *Fernandez-Vargas*, 394 F.3d at 887.

72. *Id.* It is clear that this circuit is placing more emphasis on the date of the original deportation, while the Ninth Circuit placed its emphasis on the date of the reinstatement proceedings (essentially the second deportation order).

73. *Id.* at 890.

74. *Id.*

75. *Id.*

76. *Id.* at 891.

It would be a step too far to hold that simply by re-entering the country, Fernandez created a settled expectation that *if* he did marry a U.S. citizen, he *might then* be able to adjust his status and defend against removal. “Inchoate plans to act in the future, even when made in anticipation of the legal consequences of those future actions, do not convey the type of settled expectation that retroactivity analysis seeks to protect.

*Id.* at 891 (quoting *Lattab v. Ashcroft*, 384 F.3d 8, 16). However, the Eighth Circuit held that if an alien was married before IIRIRA became effective in 1997, then IIRIRA is not applicable because “long-standing INS practice created a reasonable expectation that he could defend against later deportation or removal by seeking a discretionary adjustment of status to lawful permanent resident,” and thus IIRIRA creates an additional burden upon the alien. *Id.* at n.11 (quoting *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858, 867 (8th Cir. 2002)).

77. *Id.* The court relied upon *Landgraf* in determining that there was no impermissible retroactive effect. *Id.* at 887. In *Landgraf*, the Supreme Court examined whether application of a rule that allowed for jury trials in Title VII cases was meant to have retroactive application. See *Landgraf*, 511 U.S. at 286. There,

However, not all federal circuits have decided this issue in the same way as the Tenth Circuit; others determined that the IRA is the proper statute to apply to immigrants who re-entered prior to IIRIRA's enactment.<sup>78</sup> Therefore, the Supreme Court granted certiorari in this case in order to settle the dispute regarding the potential retroactive application of IIRIRA to other immigrants similarly situated to Fernandez-Vargas.<sup>79</sup>

#### IV. ANALYSIS

##### *A. Majority Opinion*

The majority opinion of the Court, as written by Justice Souter, begins with a thorough analysis of the meaning of retroactive application, and how courts tend to view questions of retroactivity.<sup>80</sup> The Court breaks this daunting task into a three-step analysis.<sup>81</sup> First, courts should look to whether Congress has specifically provided in the text of the statute for retroactive application.<sup>82</sup> In the absence of specific language, the court will use the "normal rules of construction" in an attempt to reach a "comparatively firm conclusion" about the temporal reach of the statute.<sup>83</sup> If the second attempt is to no avail, then the court should ask whether application to the objecting party would affect the party's substantive rights,

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the Court held that retroactive application was contrary to the Congressional intent of the Act, and thus was not applicable to Plaintiff's claim. *Id.*

78. *Fernandez-Vargas*, 394 F. 3d at 888. Two circuits, the Ninth and the Sixth, have held that § 241(a)(5) does not apply to aliens who re-entered before the effective date. *Id.* (citing *Bejjani v. INS*, 271 F.3d 670, 676-77 (Cal. App. 6 2001); *Castro-Cortez* 239 F.3d at 1050-53). Eight other circuits have held that IIRIRA, in some situations, is applicable. *Id.* Even those eight circuits are divided on the issue whether an alien's marriage to a citizen renders the statute impermissibly retroactive due to the impossibility of adjusting the alien's status. *Fernandez-Vargas*, 126 S. Ct. at n.5.

79. *Fernandez-Vargas*, 126 S. Ct. at 2427.

80. *Id.* at 2427-28.

81. *Id.* at 2428.

82. *Id.* Specific language allowing for retroactive application is obviously the ideal, as that leaves no room for judicial debate.

83. *Id.*

liabilities, or duties on the basis of prior conduct.<sup>84</sup> If the answer is yes, then the court will apply a presumption *against* retroactivity.<sup>85</sup> Unfortunately for all parties involved, the Supreme Court clarifies immediately that the IIRIRA is silent on the issue of temporal reach, and thus this problem cannot be easily disposed.<sup>86</sup>

The majority structures its analysis of this case by listing each of the contentions the petitioner makes, and then by systematically dismissing their validity.<sup>87</sup> Therefore, this analysis will be organized by listing Fernandez-Vargas' points of argument, and then by discussing the majority's response.

Fernandez-Vargas first argues that Congress specifically did not intend for IIRIRA to apply to all aliens who re-entered the country prior to IIRIRA's effective date.<sup>88</sup> This proposition is based upon the interpretive rule of *negative implication*: because a temporal reach provision was specifically excluded from the statute, it must have been Congress' intent for the rule to only have *prospective* application.<sup>89</sup> Supporting this negative implication argument is the fact that the prior INA statute included a provision for retroactive application, yet the new IIRIRA contained no such provision.<sup>90</sup> The

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84. *Id.*

85. *Id.* Notice, therefore, that the Court's reasoning does not *begin* with a presumption of retroactivity. Some may be under the impression that any court will enter a question of retroactivity with a pre-existing disfavor for retroactive application of a statute, but in fact, the reasoning begins with no bias one way or the other.

86. *Id.* at 2428. The Court states, "[n]eedless to say, Congress did not complement the new version of § 241(a)(5) with any clause expressly dealing with individuals who illegally reentered the country before IIRIRA's April 1, 1997, effective date, either including them within § 241(a)(5)'s ambit or excluding them from it." *Id.*

87. *See generally Fernandez-Vargas*, 126 S. Ct. at 2427-34.

88. *Id.* at 2428.

89. *Id.* at 2429. The analytical tool of negative implication has been recognized and utilized in the past by the Supreme Court. *See Brewster v. Gage*, 280 U.S. 327, 337 (1930) (holding that "deliberate selection of language. . . differing from that used in the earlier Acts" can indicate that the change was intended).

90. *Id.* Section 242(f) of the previous statute applied to "any alien [who] has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952, on any ground described in...subsection (e)." § 1252(f). Fernandez-Vargas argued

Court, however, does not believe that the issue can be disposed of that simply.<sup>91</sup>

The majority responds by criticizing Petitioner's reading of the text of the previous statute, and that the previous before-or-after clause was in an entirely unrelated section of the INA.<sup>92</sup> The temporal reach provision referred not to the alien's illegal re-entry but instead to the alien's original deportation.<sup>93</sup> Therefore, the provision is only relevant to the date the alien *left* the country, and not to the date he illegally *re-enters*.<sup>94</sup>

Furthermore, the majority felt that Petitioner's negative implication argument went against the legislative intent in drafting the new legislation.<sup>95</sup> IIRIRA was meant to expand the scope of deportation order reinstatement.<sup>96</sup> If omission of the before-and-after clause showed an intent to apply § 241(a)(5) only to deportations *after* IIRIRA's effective date, the result "would be a very strange one": all those who departed the country before IIRIRA's effective date but re-entered after it would be exempt from the rule.<sup>97</sup> Such an application would hardly expand the scope of application of prior deportation proceedings.<sup>98</sup> Thus, the majority dismisses this argument as meritless.<sup>99</sup>

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that because the previous before-or-after clause made retroactive application clear, its later elimination shows the Congress no longer intended the statute to apply to pre-enactment re-entrants. *Fernandez-Vargas*, 126 S. Ct. at 2429.

91. *Id.* The majority promptly responds, "the clues are not that simple." *Id.*

92. *Id.*

93. *Id.*

94. *Id.* The majority continues, "if [the before-and-after clause's] omission from the new subsection (a)(5) is significant, its immediate significance goes to the date of leaving this country, not to the date of illegal return." *Id.*

95. *Id.*

96. *Id.*

97. *Id.* The majority reaches this conclusion by looking at the position the before-and-after clause had in the previous INA. Because the temporal reach clause referred to the date of deportation and not to the date of re-entry, then application of the provision to the new IIRIRA would do the same. This, the majority feels, is contrary to legislative intent and just does not make any sense. *See id.*

98. *Id.*

The point of the statute's revision, however, was obviously to expand the scope of the reinstatement authority and invest it with something close to finality, and it would make no sense to infer



The majority then turns to Petitioner's second argument: because the statute is silent as to temporal reach, the Court should apply the presumption against retroactive application to statutes that are ambiguous as to that issue.<sup>100</sup> However, the majority finds two flaws with this argument. First, the majority feels that applying the presumption against retroactivity this early in the analysis process "puts the cart before the horse."<sup>101</sup> If the presumption against retroactivity was always applied in the absence of explicit congressional intent, then no such statute could ever be applied retroactively.<sup>102</sup>

The second flaw in Fernandez-Vargas' argument is a general failure to account for the new statute's other provisions on temporal reach.<sup>103</sup> Although IIRIRA may be silent as to the temporal reach § 241(a)(5), the new amendments make specific reference to which aliens are subject to criminal or civil penalties.<sup>104</sup> The new statute specifically provides that expanded criminal penalties are only to be applied to re-entrants who re-entered *after* the statute's effective date.<sup>105</sup> If Congress did not intend for IIRIRA to apply to *all* illegal

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that Congress meant to except the broad class of persons who had departed before the time of enactment but who might return illegally at some point in the future.

*Id.*

99. *Id.* "We therefore need not entertain Fernandez-Vargas's argument that the provision's drafting history indicates that the language was eliminated deliberately." *Id.* at n.7.

100. *Id.* at 2429. Petitioner urged the court to apply the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Id.* (quoting *INS v. St. Cyr*, 533 U.S. 289, 320 (2001)). This essentially would impose the presumption against retroactive application to statutes that do not specifically prescribe for such. *Fernandez-Vargas*, 126 S. Ct. at 2429.

101. *Id.*

102. *Id.* If this were the case, then there would be no need for the three-step inquiry process. Simply, in the absence of specific language, a statute may never be applied retroactively. This, the majority feels, is simply too broad of a proposition. *Id.*

103. *Id.* From the other references, the majority feels that one can draw a negative inference that subsection (a)(5) *was meant* to apply to re-entries before its effective date. *Id.*

104. *See* IIRIRA § 324(c).

105. *See id.*

re-entrants, no matter the date of re-entry, why would there be a need to put in such a caveat?<sup>106</sup>

After the majority decides that the language of the rule is simply too ambiguous to infer any Congressional intent as to temporal reach, it makes an interesting logistical jump: whether Congress intended the statute to apply to pre-enactment re-entries is moot, because applying the statute to aliens such as Fernandez-Vargas simply has no adverse retroactive effect anyway.<sup>107</sup> With an argument that essentially creates fodder for dissent, the majority asserts that the text of IIRIRA applies to Fernandez-Vargas not because of his date of re-entry, but because he *chose to remain* after the new statute became effective.<sup>108</sup>

Supporting this argument is the fact that Fernandez-Vargas could have taken advantage of the lead time before IIRIRA became

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106. *Fernandez-Vargas*, 126 S. Ct. at 2429. However, the majority qualifies that statement:

The point here is not that these provisions alone would support an inference of intent to apply the reinstatement provision retroactively, for we require a clear statement for that... But these provision do blunt any argument that removal of the before-or-after clause suffices to establish the applicability of § 241(a)(5) only to posteffective date reentries. . . . With such a variety of treatment, it is just too hard to infer any clear intention at any level of generality from the fact of retiring the old before-or-after language from what is now § 241(a)(5).

*Id.*

107. *Id.* at 2431. Furthermore, the majority points out that Fernandez-Vargas has absolutely no argument supporting the proposition that application of IIRIRA to him somehow cancels previously vested rights. *Id.* at n.10. "The forms of relief identified by Fernandez-Vargas as rendered unavailable to him by § 241(a)(5) include cancellation of removal. . . adjustment of status. . . and voluntary departure. . . . These putative claims to relief are not 'vested rights,' a term that describes something more than inchoate expectations and unrealized opportunities. *Id.*

108. *Id.* The majority states:

This facial reading. . . show[s] that the application suffers from no retroactivity in denying Fernandez-Vargas the opportunity for adjustment of status as the spouse of a citizen of the United States. . . the text of that provision itself, showing that it applies to Fernandez-Vargas today not because he reentered in 1982 or at any other particular time, but because he chose to remain after the new statute became effective.

*Id.*

effective.<sup>109</sup> Thus, the rule has no significant retroactive effect, because Fernandez-Vargas could have prevented the adverse affect of the statute by applying for change in status during the interim period.<sup>110</sup> No right was taken from him; it only imposed a time period in which he could enforce the rights he re-entered the country under.<sup>111</sup>

In further analysis that requires several readings to comprehend, the majority asserts that the predicate act for application of § 241(a)(5) is the act of *remaining* in the country, and *not* the date of re-entry.<sup>112</sup> Therefore, by remaining in the country after IIRIRA's

109. *Id.*

110. *Id.* To support this conclusion, the majority draws the reader's attention to its holding in *INS v. St. Cyr*. See *supra* note 100. There, the alien was a lawful permanent resident who pled guilty to an aggravated felony charge after entering into a plea agreement with the District Attorney. *INS v. St. Cyr* 533 U.S. at 293. When he entered his plea, the law allowed him to seek a waiver of deportation at the discretion of the Attorney General. *Id.* However, between the plea and the deportation proceedings, IIRIRA came into effect and repealed the provision for discretionary relief, which converted deportation from a mere possibility to an absolute certainty. *Id.* at 293. There, the court had to determine whether its holding in *Landgraf* barred application of the new law which eliminated the possibility of discretionary relief. *Id.* Because application of the new law would attach a heightened penalty onto his plea agreement, there the court held that retroactive application of IIRIRA was inappropriate. *Id.* "The answer was that converting deportation from a likely possibility to a dead certainty would add such a burden, and application of the new law was accordingly barred. *Fernandez Vargas*, 126 S. Ct. at 2431.

111. *Fernandez Vargas*, 126 S. Ct. at 2431.

112. *Id.* The convoluted language is as follows:

While the law looks back to a past act in its application to "an alien [who] has reentered...illegally," the provision does not penalize an alien for the reentry (criminal and civil penalties do that); it establishes a process to remove him "under the prior order at any time after the reentry." Thus, it is the conduct of remaining in the country after entry that is the predicate action; the statute applies to stop an indefinitely continuing violation that the alien himself could end at any time by voluntarily leaving the country. It is therefore the alien's choice to continue is illegal presence, after illegal reentry and after the effective date of the new law, that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out.

*Id.* (citations omitted).

effective date, the alien implicitly concedes to the rule.<sup>113</sup> The statutes purpose, then, is to put an end to “indefinitely continuing violations,” and should apply to all those illegal re-entrants who have remained in this country past the enactment of IIRIRA, regardless of their date of illegal re-entry.<sup>114</sup>

The detail that hurts Petitioner’s argument the most, says the majority, is the fact that there was a substantial delay in the enactment of IIRIRA.<sup>115</sup> IIRIRA became law on September 30, 1996, yet only became effective 180 days later.<sup>116</sup> Therefore, illegal re-entrants such as Fernandez-Vargas had a “grace period” between the tougher regime that was to follow.<sup>117</sup> During those six months,

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113. *See id.*

114. *Id.*

115. *Id.*

[B]ut in fact his [Fernandez-Vargas’] position is weaker still. For Fernandez-Vargas could not only have chosen to end his continuing violation and his exposure to the less favorable law, he even had an ample warning that the new law could be applied to him and ample opportunity to avoid that very possibility.

*Id.*

116. *Id.* IIRIRA “became effective and enforceable only ‘on the first day of the first month beginning more than 180 days after’ IIRIRA’s enactment, that is, April 1, 1997.” *Id.*

117. *Id.* Interestingly, one of the ways that the majority says illegal re-entrants can avoid IIRIRA’s harsh effect is by leaving the country all together. Although this is definitely a way to avoid being subject to IIRIRA’s consequences, this is almost a comical statement – by the majority’s own argument, illegal aliens should leave the country to avoid being deported from the country. There is something circular about this argument. However, the majority does recognize the harsh consequences of leaving the country: “To be sure, a choice to avoid the new law before its effective date or to end the continuing violation thereafter would have come at a high personal price, for Fernandez-Vargas would have had to leave a business and a family he had established during his illegal residence.” *Id.* Justice Stevens brings up this very point in his dissent, which the majority addresses:

Justice Stevens thus argues that reimposing an order of removal to end illegal residence is like imposing a penalty for a completed act. . . . But even on his own analysis, Fernandez-Vargas continued to violate the law by remaining in this country day after day, and Justice Stevens does not deny that the United States was entitled to bring that continuing violation to an end.

*Id.* at n.13. Therefore, the majority falls back on the unfortunate fact that Fernandez-Vargas made the personal decision not to apply for change of status during the grace period. *Id.* at 2431.

the majority says Petitioner could have availed himself of two options: either end his illegal presence by returning to Mexico, or marry the mother of his son and apply for adjustment of status while the more lenient law was still in effect.<sup>118</sup> At least then, says the majority, he would have had a credible claim for detrimental reliance on the old law, which could have been honored by applying the presumption against retroactivity.<sup>119</sup>

In its closing statements, the majority takes issue with the fact that Petitioner seeks to continue his illegal activity *ad infinitum*.<sup>120</sup> To the Court, IIRIRA was enacted for the very purpose of ending indefinite terms of illegal presence in this country.<sup>121</sup> Because IIRIRA's temporal reach applies not to the date of illegal re-entry but to violations that continue after its enactment, there is no impermissible retroactive effect against Fernandez-Vargas.<sup>122</sup> Petitioner's own failure in not applying for change of status during the grace period also means he has no credible argument for detrimental reliance on the new law.<sup>123</sup> Therefore, the Court of Appeals decision was affirmed, and IIRIRA was correctly applied to Fernandez-Vargas.<sup>124</sup>

118. *See supra* note 107.

119. *Id.* One might wonder how the Supreme Court can honestly expect an illegal alien in our country to keep abreast of changes in immigration law, so that he would have actual knowledge of the pending enactment of IIRIRA. However, it is well known that ignorance of the law is no excuse, and the majority is absolutely correct in that Fernandez-Vargas *could* have applied for a change in status during the interim period. In fact, the majority notes that many illegal re-entrants *did* take advantage of the 6 month grace period. *See id.* at n.12.

120. *Id.*

What Fernandez-Vargas complains of is the application of new law to continuously illegal action within his control both before and after the new law took effect. He claims a right to continue illegal conduct indefinitely under the terms on which it began, and entitlement of legal stasis for those whose lawbreaking is continuous. But '[i]f every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever.'

*Id.* (citations omitted).

121. *Id.* at 2431.

122. *Id.*

123. *Id.* at 2434.

124. *Id.*

*B. Dissenting Opinion*

The dissent, as delivered by Justice Stevens, takes issue with the majority's two main propositions: first, that IIRIRA was *meant* to apply to pre-enactment re-entries, and second, that the revised statute has no retroactive effect.<sup>125</sup> He reiterates the well-founded historical precedence against retroactive application of statutes, which strives not to create harsher punishments for actions already completed.<sup>126</sup> The laws that were in effect when Fernandez-Vargas re-entered the country would have rewarded his subsequent behavior: by starting a business, marrying a United States citizen and fathering a child in this country, Petitioner would have been a likely candidate for discretionary review of his residential status.<sup>127</sup> Therefore, in the face of an ambiguous statute, the majority errs by not keeping with the long-standing tradition of disfavoring retroactivity.<sup>128</sup>

As discussed previously, Fernandez-Vargas argued that the removal of the before-or-after clause that was contained in the previous statute signified an intention to prevent any retroactive application of the new IIRIRA.<sup>129</sup> However, the majority disagreed with Petitioner's analysis of the before-or-after clause, and decided that the old clause referred not to the date of re-entry, but only to the date of original deportation.<sup>130</sup> Justice Stevens agrees with the majority's analysis, but argues that it instead strengthens Fernandez-Vargas' argument.<sup>131</sup> Because the old before-or-after clause referred to pre-enactment deportations but not to pre-enactment re-entries, Congress *did not intend* for the law to apply to pre-enactment re-entries.<sup>132</sup> As such, the Court should infer that Congress' intent for

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125. *Id.* at 2435 (Stevens, J., dissenting).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 2429.

130. *Id.*

131. *Id.* at 2435 (Stevens, J., dissenting).

132. *Id.* Also, Justice Stevens argues that the "traditional presumption against" retroactivity supports this argument. *Id.* However, the majority disagrees that there is a general presumption against retroactivity, as that would "put the cart in front of the horse." See *supra* note 92. Only by going through the three step process can you fall back on a presumption against retroactivity. *Id.*

the new law remained unchanged, and IIRIRA should not affect those who re-entered before its 1997 effective date.<sup>133</sup>

The dissent not only believes that the majority fails to give IIRIRA its most rational interpretation, but also errs in its conclusion that the statute has no retroactive effect.<sup>134</sup> Of course Fernandez-Vargas could have chosen to leave the country before IIRIRA's effective date, but for every additional day he remained in the country, he increased his chances of being granted discretionary relief.<sup>135</sup> Under the previous INA, an alien became eligible for discretionary residency review when he remains in the country for not less than seven years, and when he develops ties to the United States that would make his deportation an extreme hardship.<sup>136</sup>

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133. *Fernandez-Vargas*, 126 S. Ct. at 2435 (Stevens, J., dissenting). The dissent argues:

In 1996, when Congress enacted the current reinstatement provision, it drafted a version of the statute that, like its 1950 predecessor, was silent as to its temporal reach. If we assume (as the Court does) that the addition of the “before-or-after” clause in the 1952 statute merely clarified Congress’ original intent in 1950 to make the provision applicable to preenactment departures without authorizing any application to preenactment reentries, it is reasonable to attribute precisely the same intent to the Congress that enacted the 1996 statute: as in the 1950 and 1952 versions of the provision, Congress intended the 1996 reinstatement provision to apply to preenactment deportations but not to preenactment reentries. In sum, our normal rules of construction support the reasonable presumption that Congress intended the provision to cover only postenactment reentries. Accordingly, the 1996 reinstatement provision should not be construed to apply to petitioner’s earlier entry into the United States.

*Id.*

134. *Id.* The Court reached this conclusion by determining that the provision applies not to the alien’s date of re-entry, but to the conduct of remaining in the country past the new statute’s effective date. *Id.* at 2431.

135. *Id.* at 2436 (Stevens, J., dissenting).

136. *See* 8 U.S.C. § 1254(a)(1); *see also* *INS v. Phinpathya*, 464 U.S. 183 (1984) (strictly construing the physical presence requirement). The dissent further notes that although Fernandez-Vargas became eligible for relief from deportation after being present for seven years, he could not apply for that discretionary relief until he was placed in deportation proceedings – only at this point could he raise his affirmative defense. *Fernandez-Vargas*, 126 S. Ct. at 2436 (Stevens, J., dissenting).

Therefore, if due to his date of re-entry, IIRIRA was *not* applicable to Fernandez-Vargas, it was actually in his best interest to remain in the country for as long as possible, and *then* to apply for a change in status.<sup>137</sup>

Given the incentives for Fernandez-Vargas to continue his tenure in the United States for as long as possible, the dissent strongly argues that the Government should not be allowed to “chang[e] the rules midgame.”<sup>138</sup> Hardly is there no retroactive effect: Fernandez-Vargas acted in a way to increase his chances of being granted discretionary relief under the law that was in effect at the time of his re-entry into the country, yet he is now being punished for that behavior.<sup>139</sup> Because retroactive application of this law would inflict great hardship on Petitioner, the dissent concludes that the Court should have applied the presumption against retroactivity.<sup>140</sup>

## V. CRITIQUE

The issues presented in this case are difficult, and strong arguments lie on both sides. On the Petitioner’s side, it is hard to accept that application of IIRIRA adds no more burden than would application of the INA. On the government’s side, the fact that IIRIRA makes it clear that criminal sanctions are only to be imposed upon those who reentered the country *post* IIRIRA’s effective date creates a strong argument that IIRIRA was in fact meant to apply to all illegally reentered aliens.

It is troubling that the majority downplays the Court’s long-standing preference against retroactive application of laws.<sup>141</sup> The majority cites the three-step process set forth in *Landgraf* for

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137. *Fernandez-Vargas*, 126 S. Ct. at 2436 (Stevens, J., dissenting). “Moreover, under the pre-1996 version of the reinstatement provision, the longer petitioner remained in the United States the more likely he was to be granted relief from deportation. *Id.*

138. *Id.*

139. *Id.* The dissent also takes issue with the majority’s rather flippant argument that Petitioner could have chosen to leave the country before IIRIRA became effective: “...he would have imposed upon himself the very same punishment – the guarantee of removal to Mexico – that he hopes to avoid.” *Id.* at n.4 (Stevens, J., dissenting).

140. *Id.* at 2436 (Stevens, J., dissenting).

141. *Id.* at 2429.



determining if a law is to be applied retroactively.<sup>142</sup> Based on this test, it argues that there is no general presumption against retroactive application: only after interpreting Congress' intent and establishing if there is any retroactive effect can the presumption be applied.<sup>143</sup>

However, in 1811, the issue of retroactivity was addressed in *Dash v. Van Kleeck*.<sup>144</sup> This decision is still followed to this day.<sup>145</sup> There, Chief Justice Kent stated, "[i]t is a principle of the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect."<sup>146</sup> This statement has turned into a presumption against retroactivity that has been consistently and repeatedly followed by the Supreme Court.<sup>147</sup>

Interestingly enough, the Court's reasoning in *Landgraf* seems completely contradictory to the majority's opinion in *Fernandez-Vargas*.<sup>148</sup> Obviously, the Court's first task was to determine whether the statute in issue expressly provided for retroactive

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142. *See id.* The test as set forth in *Landgraf* is as follows:

When a case implicates a federal statute enacted after the events in the suit, a court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

*Landgraf*, 511 U.S. at 280. Stated simply, this test demands (1) a look at congressional intent, (2) if congressional intent cannot be deciphered, then the Court must determine if there is any impermissible retroactive intent. If there is an impermissible effect, then the *traditional* presumption is to be applied.

143. *Landgraf*, 511 U.S. at 280.

144. 7 Johns. 477 (N.Y. 1811).

145. Elizabeth Siemer, *The Impact of Landgraf v. USI Film Products: The Retroactive Application of the Private Securities Litigation Reform Act*, 26 CAP. U.L. REV. 595, 596 (1997).

146. 7 Johns. at 502.

147. Siemer, *supra* note 145 at 596.

148. *See* Michelle LeVeque, *Rationales for Applying CERCLA Retroactively After Landgraf v. USI Film Products: Overcoming the Presumption Against Retroactivity*, 59 OHIO ST. L.J. 603, 612 (1998).

application.<sup>149</sup> With the absence of express language, the Court had to determine whether there was “clear congressional intent” to *overcome* the presumption of retroactivity.<sup>150</sup> That language suggests that a presumption against retroactivity exists on its own, rather than as the last step in an analytical process.<sup>151</sup>

Recall that the majority relied strongly on the fact that IIRIRA mentioned that criminal penalties are only to be applied to post-enactment reentries, thus suggesting that the other provisions were meant to apply to pre-enactment reentries.<sup>152</sup> Interestingly, the Supreme Court in *Landgraf* rejected a similar line of reasoning. The losing party in *Landgraf* argued: “because Congress provided specifically for prospectivity in two places. . . [the Court] should infer that it intended the opposite for the remainder of the statute.”<sup>153</sup> The Court’s response to this was that Congress knew how to provide for retroactivity if it intended to, and given the high consequences of application of the statute, the presumption against retroactivity has not been successfully overcome.<sup>154</sup> It is strange that the court swayed so drastically from their prior reasoning when deciding *Fernandez-Vargas*.

The majority in *Fernandez-Vargas* also stated that non-retroactive application of IIRIRA is contrary to the stated purpose of the rule.<sup>155</sup> The Court in *Landgraf* also used the “purpose of the rule” as an analytical tool in deciding whether retroactive application is appropriate.<sup>156</sup> There, however, the court found that the “purpose argument” was “not sufficient to rebut the presumption against

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149. *Id.*

150. *Id.* (quoting *Landgraf* 511 U.S. at 259).

151. Recall the majority’s assertion that the presumption against retroactivity does not stand on its own – you only reach that presumption at the end of the three-step process. *See supra* note 85.

152. *See supra* note 95.

153. *Landgraf*, 511 U.S. at 259.

154. *Id.* “Given the high stakes of the retroactivity question, the broad coverage of the statute, and the prominent and specific retroactivity provisions in the 1990 bill, it would be surprising for Congress to have chosen to resolve that question through negative inferences drawn from two provisions of quite limited effect.” *Id.*

155. *See supra* note 88.

156. *Landgraf*, 511 U.S. at 285.

retroactivity.”<sup>157</sup> In *Fernandez-Vargas* however, the Court suddenly gives more weight to the perceived purpose of IIRIRA.

Based upon this, it is strange that the majority makes the assertion that the Court has no preference for, or presumption against, retroactive application of laws. Even the *Landgraf* Court, which this majority relies so strongly upon, states that the presumption against retroactivity is a traditional one.<sup>158</sup> Therefore, because the language of IIRIRA is relatively unclear as to temporal reach,<sup>159</sup> it is curious that the court chooses not to rely on its traditional disfavor of retroactive statutory application.

Perhaps the most troubling statement the majority makes is that there is no retroactive effect as applied to *Fernandez-Vargas*. We know from our judicial history that retroactive application is inappropriate where it (1) would impair contractual or property rights, (2) impair a party's rights that have previously vested, (3) add burdens upon a party that were not upon him at the time of action, or (4) place new monetary obligations upon a party.<sup>160</sup> At the time *Fernandez-Vargas* reentered the country, the effective law allowed illegal immigrants discretionary relief from their previous deportation orders. Under the INA, the longer the alien remained in the country, and the more ties an alien created, the more likely they would be allowed to remain.<sup>161</sup> The law commended those who made good lives for themselves here.<sup>162</sup> This is the assumption that *Fernandez-Vargas* operated under while in this country, and that is why he applied for change in residential status after almost 30 years of behaving as a proper American citizen.<sup>163</sup>

Therefore, when *Fernandez-Vargas* entered the country, the law afforded him a procedural option to petition for residency; yet, when IIRIRA was enacted almost 30 years later, that procedural option was taken away from him.<sup>164</sup> Clearly, an added burden was placed upon

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157. *Id.*

158. *See supra* note 132.

159. *Fernandez-Vargas*, 126 S. Ct. at 2429.

160. Siemer, *supra* note 145 at 600-01.

161. *See* INA § 242(f).

162. *See id.*

163. *See Fernandez-Vargas*, 126 S. Ct. at 2427.

164. *See generally* IIRIRA § 241(a)(5).

him when the opportunity for procedural review was summarily denied. This is what makes the effect retroactive, whether permissive or not. Thus, perhaps it would have been easier to accept if the majority had held that retroactive effect is *permissible*, rather than there is no retroactive effect whatsoever.

The majority seems to gloss over the clear due process implications of applying this law to Petitioner. Although the Supreme Court has said that aliens subject to deportation or exclusion from the country may only be entitled to abridged due process rights, other individual's due process rights are implicated by Petitioner's deportation.<sup>165</sup> If an alien wishes to apply to adjustment of status, it is frequently on the grounds of marriage, parentage of children, or extended tenure within United States' borders.<sup>166</sup> In Petitioner's case, the rights of his legal-resident wife and child should also be considered – if not for legal reasons, then for humanitarian ones. It is easier to rationalize deportation of an illegal immigrant in this country, especially with the abridged Constitutional rights afforded to him. However, a whole family, consisting primarily of *American citizens*, is being affected by retroactive application of this rule. Because the family is not the named petitioner, are they subject to abridged due process rights as well?

The final point of criticism for the majority's holding is based upon the well-established immigration principle known as the "Rule of Lenity."<sup>167</sup> This rule is easy to understand and easy to apply: *when there are ambiguities in an immigration statute, the statute should be interpreted in a way most favorable to the alien.*<sup>168</sup> There is strong Supreme Court precedent supporting this principle.<sup>169</sup>

It is a tough argument to assert that there are no ambiguities in IIRIRA, and that the most favorable approach to Petitioner is

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165. Jeffrey A. Bekiares, *In Country, On Parole, Out of Luck – Regulating Away Alien Eligibility for Adjustment of Status Contrary to Congressional Intent and Sound Immigration Policy*, 58 FLA. L. REV. 713, 726 (2006).

166. *Id.*

167. *Id.* at 725.

168. *Id.*

169. *Id.* C.f. *Bonetti v. Rogers*, 356 U.S. 691, 699 (1958), in which the Court held, "we cannot 'assume that congress meant to trench on [an alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used.'" (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

retroactive application of IIRIRA. But this is exactly what the majority in effect is arguing – how else can the rule of lenity be reconciled here?

In fact, the Rule of Lenity is not reconciled – or even considered – in the majority’s holding here. IIRIRA is decidedly ambiguous in its temporal reach provisions. Considering the fact that the other points the majority relies upon also seem contradictory to prior Supreme Court precedence (remember *Landgraf*), the Rule of Lenity should not have been so readily dismissed.

The strongest fact supporting the majority and working against Fernandez-Vargas is the fact that IIRIRA is not *completely* silent as to temporal reach. The statute makes clear that criminal sanctions are only to be imposed against those who have reentered the country post IIRIRA’s effective date.<sup>170</sup> The implication drawn is that those who reenter *prior* to IIRIRA’s effective date are not to be criminally sanctioned, but are still subject to immediate deportation without discretionary review. Based on this relatively simple qualification, the majority makes the only conclusion that it reasonably can: that Congress intended IIRIRA to apply to all illegal aliens, no matter their date of reentry.<sup>171</sup> To be sure, if this small temporal qualification was not within the statute, the presumption against retroactivity would likely have been applied here. However, based upon the *Landgraf* test, because some congressional intent can be gleaned from the statute, the presumption against retroactivity need not be applied.<sup>172</sup>

## VI. IMPACT

Certainly, IIRIRA was an attempt by Congress to tighten immigration control mechanisms and serve as a deterrent to illegal migration to the United States.<sup>173</sup> Many felt that the prior INA regime created fodder for blatant immigration abuses.<sup>174</sup> Due to the

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170. See *Fernandez-Vargas*, 126 S. Ct. at 2429.

171. *Id.*

172. See *supra* note 132.

173. See generally INA § 241(a)(5)

174. Daniel Stein & Terri M. Barton, *Immigration Reform Laws: Redefining who Belongs: Essay: The Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Notable Changes for Restoring Integrity and*

fact that it was relatively easy for an illegal alien to successfully apply for change in status, there was little deterrent for aliens to illegally migrate to our country.<sup>175</sup> Therefore, IIRIRA was meant to send a clear message to those contemplating illegal migration: *if you enter this country illegally, you will not be rewarded for your efforts.*<sup>176</sup>

Proponents of IIRIRA argue that enforcement of the United States' immigration laws is a necessary element of effective national security.<sup>177</sup> The prior INA created many loopholes for illegal immigrants that essentially rewarded them for ignoring the law, and the text of IIRIRA serves to close those loopholes and send a deterrent message instead.<sup>178</sup> This is specifically relevant to those like Fernandez-Vargas who re-entered the country illegally after being deported: under the new statutory regime, such aliens can no longer apply for discretionary review, and thus they are no longer being rewarded for covertly remaining in the country.<sup>179</sup>

There are approximately six million illegal aliens currently on United States soil. About half of those illegal aliens are "EWI's," or aliens who have entered the states without inspection.<sup>180</sup> The other half is comprised of those who have overstayed their temporary visas.<sup>181</sup> Under the precedent set forth in *Fernandez-Vargas*, all of those illegal aliens who have been previously deported – no matter *when* they re-entered – are automatically deportable once again,

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*Credibility to U.S. Immigration Policy*, 1 RUTGERS RACE & L. REV. 111, 111-12 (1998). For example, under INA, when an alien violated the terms of his visa or entered the country illegally, more likely than not the alien could successfully petition for change in status to that of lawful permanent resident. *Id.* at 112.

175. *Id.*

176. *See generally id.*

177. *Id.* "Enforcement of the nation's immigration laws serves to ensure its national security and welfare...Thus, IIRIRA should be viewed as a positive step toward regaining control of the entire system for regulating immigration." *Id.*

178. *Id.* What is meant by "loopholes" is the ability of illegal aliens to readily petition for change in status to that of lawful permanent resident. Some have estimated that the success rate of these petitions was up to 50 per cent. *Id.* at 124.

179. *See* IIRIRA § 241(a)(5). The longer the alien remained in the country undetected, the better chance he would have for successfully petitioning for change in residential status.

180. Stein & Barton, *supra* note 174 at 120.

181. *Id.*

without the appellate review process previously in place.<sup>182</sup> Therefore, no longer is there a statutory advantage for remaining in this country undetected; however, there is no benefit in leaving the country either.<sup>183</sup>

For those illegal aliens who choose to leave the country on their own volition, under IIRIRA they may not simply apply for legal reentry once removed to their country of origin.<sup>184</sup> Instead, they are barred from legal reentry for a period of time depending on the duration of their illegal residence in the United States.<sup>185</sup> Specifically, for those aliens who remain illegally in the country for between six months and one year, they are barred for applying for reentry for a period of three years.<sup>186</sup> For those who remain in the country for more than one year, such as Fernandez-Vargas, they are barred for a substantial *ten year* period.<sup>187</sup>

Thus, for aliens like Fernandez-Vargas, who do not face the possibility of criminal sanctions for their illegal presence, there is only one viable solution, which Congress *certainly* did not intend: remain in the country illegally and covertly for as long as possible, because one discovered, you will be immediately deported, and cannot petition for reentry for at least ten years. Even proponents of IIRIRA recognize this as a problem. The message that IIRIRA sends to some illegal aliens is to *continue* to break the law.<sup>188</sup>

182. See generally *Fernandez-Vargas*, 126 S. Ct 2422.

183. Like Justice Stevens mentioned, leaving the country on their own volition is exactly the punishment the aliens were trying to avoid in the first place. And as we will see, no favorable treatment is given to those illegal aliens who leave the country on their own volition and then attempt to *legally* reenter the country. Perhaps the only benefit is the fact that aliens who re-entered the country after IIRIRA's effective date can be subjected to criminal penalties for doing so; but for aliens such as Fernandez-Vargas, to whom the criminal penalties do not apply, there is truly no favorable solution.

184. See 8 U.S.C. § 1182(a)(9)(B)(i)(I), (II).

185. See *id.*

186. See *id.*

187. See *id.*

188. Stein & Barton, *supra* note 174 at 122.

Even though the new law toughens the penalty for illegal aliens who are apprehended, the three and ten-year bar only apply to illegal aliens who depart from the U.S., either through

We must then ask ourselves, which solution is better? Under INA, we would have about half of those illegal aliens in our country successfully petitioning for legal residency.<sup>189</sup> Of course this creates more population density, and perhaps encourages more to migrate illegally, yet also creates a larger tax base.<sup>190</sup> Under IIRIRA, although those aliens are still within our borders, they remain illegal, and thus are never part of the tax-paying population. However, due to the threat of criminal penalties, perhaps fewer aliens will even attempt to reenter the country illegally.<sup>191</sup> There are viable arguments on both sides, and it is difficult to determine which solution is preferable. One issue, though, was made perfectly clear by the Supreme Court in this case: if you are an alien similarly situated to Fernandez-Vargas, *stay where you are and don't get caught!*<sup>192</sup>

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deportation or voluntarily, and then seek to re-enter. Thus, the message to illegal aliens currently residing in the United States is to remain here and avoid getting caught. After all, the illegal alien seems to be better off if he continues to reside here, rather than if he leaves under the penalty of not being able to return for a number of years.

*Id.*

189. See *supra* note 136.

190. However, one could counter this assertion by stating that although there is technically a larger tax base, a high number of these now legal aliens may petition for public support, thus creating larger burdens on the taxpayers. Already, though, illegal immigrants are said to cost \$10.5 billion dollars a year – just for Californians, and just for education, health care, and incarceration expenses. Jerry Seper, *Illegal Aliens Cost California Billions*, WASH. TIMES, Dec. 7, 2004, at A08. Educating children of illegal aliens costs \$7.7 billion alone. *Id.* Others counter that these expenses do not consider the contributions these illegal immigrants make to the state's economy. *Id.* After all, they are a source of inexpensive labor for American businesses. *Id.* Some would even say that they are the “backbone” of the multi-billion dollar agricultural industry. *Id.*

191. See INA § 241(a)(5).

192. Remember that these expedited removal procedures only apply to aliens who have been previously deported from the country. See *Id.* Other illegal aliens, even those who have criminal records, may still be allowed to petition for change in status. *Id.* Here are some brief accounts of certain illegal immigrants who were allowed to remain in our country:

Citing “severe emotional hardship” to her family and American-born children, a three-member panel of the board halted the deportation of Haitian nanny Melanie Beaucejour Jean. She had been convicted in upstate New York of killing an 18-month-old



## VII. CONCLUSION

Immigrants form an integral part of our culture. They work in every occupation and sector of the economy.<sup>193</sup> They form strong familial ties and bonds of friendship with all types of American residents.<sup>194</sup> The historical beginnings of our nation paint a picture that embraced immigration and the vibrancy and growth that it can bring.

Clearly, though, times have changed. Millions of immigrants remain in our country illegally, and curbing this tide of

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baby in her care. "I hit him two or three times with my fist on the top of his head. I did this to stop him from crying. It did not work," she told Monroe County, New York, investigators. "I do not know how long I shook the baby, but I did not stop until he was unconscious," her police statement said. At the request of the INS, immigration judge Phillip J. Montante Jr. ordered her deported back to her native land more than two years ago. But thanks to a trio of pro-alien, Janet Reno-installed bureaucrats, Beaucejour Jean continued to enjoy life in America...

Michelle Malkin, The Center for Immigration Studies, *The Deportation Abyss*, "It Ain't Over 'Til the Alien Wins," , available at <http://www.cis.org/articles/2002/back1002.html#19> (citing Jerry Seper, *Ashcroft reviews overturned deportation*, WASH. TIMES, Dec. 19, 2001 at A4).

Finally, Attorney General John Ashcroft overturned this decision. Another interesting example of a questionable deportation decision is as follows:

Stephanie Short, a German national, was convicted of encouraging her 3-year-old daughter to submit to sexual assault at the hands of her stepfather. He was convicted of sexual offenses; she was convicted of aiding and abetting the assault of a minor with the intent to commit a felony. She served three years of an eight-year sentence and was released on parole. The INS sought Short's deportation based on her conviction for a crime of moral turpitude (in other words, a crime that is inherently base, vile, or depraved). An immigration judge supported the move. Short appealed to the BIA. In a mind-boggling decision, the board determined that it "was inappropriate to consider the husband's conviction record for purposes of determining the underlying crime of which the respondent was convicted of aiding and abetting."

*Id.* (quoting *Matter of Short*, 20 I. & N. Dec. 136 (BIA 1989)).

193. Beckiares, *supra* 165 at 714 .

194. *Id.*

undocumented immigration is a daunting task for our administrative agencies to take on.

With the promulgation of laws like IIRIRA, the government is attempting to deter illegal immigration by quashing the ideal that the longer an alien remains in the country undetected, the more likely he will be granted a change in residential status.<sup>195</sup> The rule set forth in *Fernandez-Vargas v. Gonzales* only serves as a judicial attempt to reiterate the same ideal.<sup>196</sup>

But has the Supreme Court succeeded? The lesson learned here is that no matter how long you have remained in the country after being once deported, if caught, you will be summarily deported pursuant to that original order.<sup>197</sup> Essentially, the message this sends to all others similarly situated to Humberto Fernandez-Vargas is to continue to do all they can to remain undetected.

Realistically, the holding here does nothing to curb the tide of illegal immigration; instead, it simply encourages illegal immigrants to continue breaking the law. After all, the government no longer rewards you for cultivating ties to the nation and the people therein – it simply deports.

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195. *See generally* INA § 241(a)(5).

196. *See generally* *Fernandez-Vargas v. Gonzales*, 126 S. Ct. at 2422.

197. *See generally* *id.*

